



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 15, 18, 36, 40, 140

RIN 3038-AE10

Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) is taking final action to revise its regulations by removing the part 36 regulations. Those regulations implemented provisions of the Commodity Exchange Act (“CEA”) that established exempt boards of trade and exempt commercial markets – two categories of derivatives-trading platforms that were eliminated from the CEA by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). This action also removes various cross-references in other Commission regulations implicating exempt boards of trade and exempt commercial markets.

DATES: This rulemaking is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581; Dana R. Brown, Division of Market Oversight, telephone (202) 418-5093 and e-mail dbrown@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.¹ Title VII of the Dodd-Frank Act² amended the CEA³ to establish a comprehensive framework for the regulation of over-the-counter derivatives, also known as swaps. Among other reforms, Title VII requires that any person who operates a facility to trade swaps register as a designated contract market (“DCM”) or a swap execution facility (“SEF”);⁴ the latter is a category of trading market newly established under the law. Concurrently, Title VII eliminated from the CEA two categories of exempt markets for the trading of derivatives originally established in the CEA by the Commodity Futures Modernization Act of 2000 (“CFMA”):⁵ exempt commercial markets (“ECMs”) and exempt boards of trade (“EBOTs”).

Under the CFMA’s revisions to the CEA, ECMs could trade exempt commodities⁶ (i.e. any commodity other than an excluded commodity⁷ and agricultural commodities) on electronic trading facilities between eligible commercial entities⁸

¹ Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

² Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

³ 7 U.S.C. 1 *et seq.* (2012).

⁴ Dodd-Frank Act Section 733 (amending the CEA to add new section 5h).

⁵ Pub. L. 106-554, 114 Stat. 2763 (December 21, 2000).

⁶ *See* CFMA Section 101(4) (amending CEA to add definition of “Exempt Commodity,” currently codified as CEA Section 1(a)(20), 7 U.S.C. 1a(20) (2012).

⁷ “Excluded Commodity” is also a statutorily defined term, currently codified as CEA Section 1(a)(19), 7 U.S.C. 1a(19) (2012). Generally characterized, the term captures, among other things specified financial instruments, measures, and indexes (*e.g.*, securities and security indexes, currencies, interest rates, debt instruments, and credit ratings); any “otherrate, differential, index, or measure of economic or commercial risk, return or value” not substantially based on the value of a narrow commodity group or solely based on a commodity or commodities with no cash value; and other economic or commercial indexes, or occurrences and contingencies associated with an economic consequence, beyond the control of parties to the relevant contract, agreement or transaction.

⁸ The definition of “Eligible Commercial Entity” is found in Section 1a(17) of the CEA. 7 U.S.C. 1a(17) (2006).

without complying with comprehensive designation criteria and core principles that were applicable to designated contract markets. A facility that elected to operate as an ECM was generally exempt from regulation, but was still required to comply with certain informational and recordkeeping requirements, if the market satisfied the conditions for the exemption found in Sections 2(h)(3) through (5) of the CEA, 7 U.S.C. 2(h)(3) – (5), including a requirement that the ECM notify the Commission of its intent to rely upon the exemption.⁹

Under CEA Section 5d, 7 U.S.C. 7a-3, EBOTs were facilities that traded commodities (other than securities or securities indexes) that had a nearly inexhaustible deliverable supply and either no cash market or a cash market so liquid that any contract traded on the commodity was highly unlikely to be susceptible to manipulation. EBOT transactions were limited to eligible contract participants¹⁰ and subject to minimal trading prohibitions, including anti-fraud and anti-manipulation restrictions. EBOTs were required to file notice with the Commission of their election to operate as an EBOT.¹¹

Section 723 of the Dodd-Frank Act repealed CEA Section 2(h)(3) as it then existed,¹² thus eliminating the ECM category. Section 734 of the Dodd-Frank Act similarly repealed CEA Section 5d,¹³ thus eliminating the EBOT category. Both Sections 723 and 734 of the Dodd-Frank Act contain grandfather provisions allowing existing ECMs and EBOTs to petition the Commission to continue to operate as ECMs and

⁹ The Commission's part 36 regulations established similar requirements for EBOTs.

¹⁰ The definition of "Eligible Contract Participant" is found in Section 1a(18) of the CEA, 7 U.S.C. 1a(18) (2012).

¹¹ The Commission's Part 36 regulations established similar requirements for ECMs.

¹² The Dodd-Frank Act amended Section 2(h) of the CEA effective July 16, 2011, H.R. 4173, Section 723(a)(1), Pub. L. 111-203, 124 Stat. 1376, by striking existing subsection (h) – "Transactions in exempt commodities" and inserting new subsection (h) – "Clearing requirement" not addressed to exempt commercial markets.

¹³ The Dodd-Frank Act repealed Section 5d of the CEA effective July 16, 2011, H.R. 4173, Section 734(a), Pub. L. 111-203, 124 Stat. 1376 (2010).

EBOTs subject to the requirements of the CEA Sections 2(h)(3) and 5d, respectively, for a limited period of time.¹⁴ Pursuant to these grandfather provisions, the Commission issued an order in September 2010 granting petitioning ECMs and EBOTs up to one year of grandfather relief from the general effective date of the Dodd-Frank Act amendments to the CEA (“Grandfather Relief Order”).¹⁵

Subsequent to the Grandfather Relief Order, the Commission issued a series of orders¹⁶ and Commission staff issued various no-action letters¹⁷ that effectively extended expiration of the relief provided to ECMs and EBOTs in the Grandfather Relief Order. Collectively, the Grandfather Relief Order and subsequent Commission orders and staff no-action letters allowed ECMs and EBOTs, as well as other markets that relied on various pre-Dodd-Frank Act provisions of the CEA,¹⁸ to continue operations under a regulatory status quo and, thus, ensured that industry practices would not be unduly disrupted during the transition to the new Dodd-Frank Act regulatory regime.¹⁹

The Grandfather Relief Order and various subsequent Commission orders have all expired, and entities that previously operated as ECMs or EBOTs are seeking registration to become either DCMs or SEFs to continue their operations. Accordingly, the

¹⁴ ECMs and EBOTs were permitted to continue operations until July 16, 2012 pursuant to a grandfather relief order issued by the Commission pursuant to Sections 723(c)(2)(B) and 734(c)(2) of the Dodd-Frank Act, respectively.

¹⁵ 75 FR 56513 (September 16, 2010).

¹⁶ 76 FR 42522 (July 19, 2011), 76 FR 80233 (December 23, 2011), and 77 FR 41260 (July 13, 2012).

¹⁷ CFTC No-Action Letter No. 12-48 (December 11, 2012), available at:

<http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/12-48.pdf> and CFTC No-Action Letter No. 13-28 (June 17, 2013), available at:

<http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-28.pdf>.

¹⁸ See e.g., CEA Sections 2(d), 2(e), 2(g), 2(h), and 5d.

¹⁹ The Commission orders and no-action letters were generally structured to permit transactions and relevant persons and entities to continue to rely on various CEA exemptive and excluding provisions in place prior to July 16, 2011 subject to other conditions, various anti-fraud and anti-manipulation prohibitions and the expiration of exemptive relief orders as various Dodd-Frank Act implementing regulations became effective.

Commission is removing all references to the Commission exemptive orders from Title 17 of the Code of Federal Regulations.

As discussed in section III.A. below, the Commission is publishing this final rule pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(A), which provides that the requirements for notice and opportunity for public comment do not apply to "rules of agency organization, procedure, or practice"²⁰ The rulemaking conforms the Commission's regulations to the statutory requirements of the CEA by removing provisions that are of no legal effect because they concern exempt market categories that Congress, through the Dodd-Frank Act, removed from the statute; the Commission has no authority or discretion under the statute to retain the ECM and EBOT category designations in its regulations. As such, the amendments effected through this rulemaking—which have no impact on substantive rights or obligations under the CEA, as amended by the Dodd-Frank Act—are entirely ministerial and procedural in nature.

II. Amended Regulations

A. Part 36

The Commission is removing part 36 of its regulations in its entirety in order to reflect the Dodd-Frank Act's elimination of the two categories of exempt markets – ECMs and EBOTs – from the CEA.

B. Parts 15, 18, 40, and 140

The Commission is removing from parts 15, 18, 40, and 140 all references to the Grandfather Relief Orders added to the Commission's regulations by Adaptation of Regulations To Incorporate Swaps rulemaking,²¹ as the authority under which those

²⁰ See 5 U.S.C. 553(b) & (c).

²¹ Adaptation of Regulations To Incorporate Swaps, 77 FR 66288 (November 2, 2012).

orders were issued has expired, and is removing all references in the Commission's regulations to the terms ECMs, EBOTs, and electronic trading facilities (as sometimes used in the Commission's regulations to refer to ECMs).²²

1. Regulation 15.05: Designation of agent for foreign persons.

The Commission is removing from regulation 15.05 all references to contracts identified in part 36.

2. Regulation 18.05: Maintenance of books and records.

The Commission is removing from regulation 18.05 all references to ECMs and EBOTs.

3. Regulation 40.8: Availability of public information.

The Commission is removing from regulation 40.8 all references to electronic trading facilities on which significant price discovery contracts are traded or executed.

4. Appendix D to Part 40 – Submission Cover Sheet and Instructions.

The Commission is removing from Appendix D to part 40 the reference to electronic trading facilities with a significant price discovery contract.

5. Regulation 140.99: Requests for exemptive, no-action and interpretative letters.

The Commission is removing from regulation 140.99 all references to ECMs and EBOTs.

²² The Commission proposed and finalized rules in the "Adaptation of Regulations to Incorporate SEFs" to make a number of conforming amendments to integrate the Commission's regulations more fully with the new swaps framework created by the Dodd-Frank Act. 77 FR 66288 (November 2, 2012).

III. Administrative Compliance

A. Administrative Procedure Act

The Administrative Procedure Act (“APA”)²³ generally requires a Federal agency to publish notice of a proposed rulemaking in the Federal Register and allow opportunity for public comment before propounding a final rule.²⁴ This requirement does not apply, however, to non-legislative rules of “agency organization, procedure, or practice.”²⁵ In this case, the revisions to the Commission’s regulations in this rulemaking do not establish any new substantive or legislative rules. Rather, this final rule makes technical amendments to various Commission regulations to reflect the fact that Congress has eliminated the ECM and EBOT category designations from the CEA. As such, the amendments effected through this rulemaking—which have no impact on substantive rights or obligations under the CEA, as amended by the Dodd-Frank Act—are entirely ministerial and procedural in nature. This final rule shall become effective upon publication in the Federal Register.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires the Commission to consider whether the regulations it adopts will have a significant economic impact on a substantial number of small entities.²⁶ The Commission certifies that this rulemaking will have no significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act.²⁷ There is no additional submission required as a result of this action. Accordingly,

²³ 5 U.S.C. 551 et seq.

²⁴ See 5 U.S.C. 553(b) & (c).

²⁵ See 5 U.S.C. 553(b)(A).

²⁶ See 5 U.S.C. 601 et seq.

²⁷ See id.

the Commission is not obligated to conduct a regulatory flexibility analysis for this rulemaking.

C. Paperwork Reduction Act

The Commission may not conduct or sponsor, and a respondent is not required to respond to, a collection of information contained in a rulemaking unless the information collection displays a currently valid control number issued by the Office of Management and Budget ("OMB") pursuant to the Paperwork Reduction Act.²⁸ This rulemaking contains no collection of information that obligates the Commission to obtain a control number from OMB.

D. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.²⁹ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

The Commission is removing its Part 36 regulations and amending §§ 15.05, 18.05, 40.8, Appendix D to part 40, and § 140.00. Part 36 originally implemented provisions of the pre-Dodd-Frank CEA that established EBOTs and ECMs—two

²⁸ See 44 U.S.C. 3501 *et seq.*

²⁹ 7 U.S.C. 19(a).

categories of derivatives-trading platforms that were eliminated from the CEA by the Dodd-Frank Act—while the other regulations contained references to ECM and EBOTs. The Commission is using the CEA, as amended by the Dodd-Frank Act, as the baseline for assessing whether and to what extent costs or benefits are likely to flow from the amendments, and is only considering the costs and benefits of its discretionary actions permissible within the parameters of the statute.

2. Costs

Since the Dodd-Frank Act eliminated ECMs and EBOTs from the CEA, the Commission lacks authority to make or retain provisions for them within its regulations. Accordingly, there are no costs to the industry or the public associated with the amendments to remove implementing language for ECMs and EBOTs in part 36 and obsolete, vestigial references to ECMs and EBOTs in parts 15, 18, 40, and 140.

3. Benefits

The Commission believes that market participants and the public will benefit from these ministerial rule amendments since they eliminate obsolete, vestigial provisions and references that otherwise could be construed to give rise to confusing inconsistencies between the Commission's regulations and the provisions of the CEA, as amended by the Dodd-Frank Act.

4. Section 15(a) Factors

Protection of market participants and the public. By squaring its regulations with Dodd-Frank Act amendments to the CEA eliminating authorization for ECMs and EBOTs, the Commission believes it is furthering the interest of protecting market participants and the public. These amendments eliminate potential for confusion that

otherwise might arise from retaining outdated provisions addressed to statutorily-
obsolesced trading platforms.

Efficiency, competitiveness, and financial integrity of futures markets. The
Commission believes that the amendments will not materially affect the efficiency,
competitiveness, and financial integrity of futures markets.

Price discovery. The Commission believes that the amendments will not
materially affect the price discovery process.

Sound risk management practices. The Commission believes that the
amendments will not materially affect sound risk management practices.

Other public interest considerations. The Commission believes that the
amendments will not materially affect other public interest considerations.

List of Subjects

17 CFR Part 15

Brokers, Reporting and recordkeeping requirements.

17 CFR Part 18

Reporting and recordkeeping requirements.

17 CFR Part 36

Commodity futures.

17 CFR Part 40

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 140

Authority delegations (government agencies), Conflicts of interest,
Organization and functions (government agencies).

For the reasons stated in the preamble, under the authority of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), the Commodity Futures Trading Commission amends 17 CFR chapter I as set forth below:

PART 15 – REPORTS – GENERAL PROVISIONS

1. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

2. Revise paragraph (a) of § 15.05 to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term “futures contract” means any contract for the purchase or sale of any commodity for future delivery, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term “option contract” means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term “customer” means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term “communication” means any summons,

complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

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PART 18 – REPORTS BY TRADERS

3. The authority citation for part 18 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 6t, 12a, and 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

§ 18.05 [Amended]

4. Amend § 18.05 as follows:

a. Remove paragraphs (a)(3) and (a)(4);

b. In paragraph (a)(2), add the word “and” after the semicolon at the end of the paragraph; and

c. Redesignate paragraph (a)(5) as paragraph (a)(3).

PART 36 – [REMOVED AND RESERVED]

5. Remove and reserve part 36.

PART 40 – PROVISIONS COMMON TO REGISTERED ENTITIES

6. The authority citation for part 40 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 7, 7a and 12, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

§ 40.8 [Amended]

7. Amend § 40.8 by removing and reserving paragraph (b).

8. Revise Appendix D to part 40 to read as follows:

Appendix D to Part 40 – Submission Cover Sheet and Instructions

(a) A properly completed submission cover sheet shall accompany all rule and product submissions submitted electronically by a registered entity in a format and manner specified by the Secretary of the Commission to the Secretary of the Commission. A properly completed submission cover sheet shall include all of the following:

1. Identifier Code (optional)—A registered entity Identifier Code at the top of the cover sheet, if applicable. Such codes are commonly generated by registered entities to provide an identifier that is unique to each filing (e.g., NYMEX Submission 03-116).

2. Date—The date of the filing.

3. Organization—The name of the organization filing the submission (e.g., CBOT).

4. Filing as a—Check in the appropriate box indicating that the rule or product is being submitted by a designated contract market (DCM), derivatives clearing organization (DCO), swap execution facility (SEF), or swap data repository (SDR).

5. Type of Filing—An indication as to whether the filing is a new rule, rule amendment or new product. The registered entity should check the appropriate box to indicate the applicable category under that heading.

6. Rule Numbers—For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

7. Description—For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the registered entity,

market participants, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

(b) Other Requirements—A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The filing of the submission cover sheet does not obviate the registered entity's responsibility to comply with applicable filing requirements (e.g., rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) Checking the box marked “confidential treatment requested” on the Submission Cover Sheet does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment in § 40.8 and, where appropriate, § 145.9 of this chapter, and will not substitute for notice or full compliance with such requirements.

PART 140 – ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

9. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

10. Revise paragraph (d)(2)(i) of § 140.99 to read as follows:

§ 140.99 Requests for exemptive, no-action and interpretative letters.

* * * * *

(d) * * *

(2)(i) A request for a Letter relating to the provisions of the Act or the Commission's rules, regulations or orders governing designated contract markets,

registered swap execution facilities, registered swap data repositories, registered foreign boards of trade, the nature of particular transactions and whether they are exempt or excluded from being required to be traded on one of the foregoing entities, made available for trading determinations, position limits, hedging exemptions, position aggregation treatment or the reporting of market positions shall be filed with the Director, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

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Issued in Washington, DC, on September 28, 2015, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions – Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2015-25029 Filed: 10/1/2015 08:45 am; Publication Date: 10/2/2015]